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SENATE

REPORT
No. 91-1053

EDWIN E. FULK

JULY 30, 1970.—Ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 2950]

The Committee on the Judiciary, to which was referred the bill (H.R. 2950) for the relief of Edwin E. Fulk, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to relieve Edwin E. Fulk, of Davis, Calif., of liability in the amount of $4,963.46 for overpayments of retired pay in the period from December 15, 1959, to March 31, 1968, by the Department of the Army as the result of an administrative error. The bill would authorize the refund of any amounts withheld or repaid by reason of that liability.

STATEMENT

The Department of the Army in its report to the House Judiciary committee indicated that it is not opposed to the bill.

Mr. Fulk, who was born on January 1, 1916, enlisted in the National Guard on April 13, 1935, performed no active duty, and was discharged on September 29, 1936. On October 1, 1936, Mr. Fulk enlisted in the Regular Army and served on continuous active duty, until discharged on February 28, 1958. While in an active status, Mr. Fulk served as a commissioned officer (May 11, 1949–June 13, 1953, and November 10, 1950–December 29, 1953), a warrant officer (February 25, 1943–May 10, 1949), and as an enlisted member. At the time

of his final discharge from the Regular Army, Mr. Fulk held an appointment in the grade of chief warrant officer W–3, assigned to the Army Reserve.

On March 1, 1958, Mr. Fulk was retired in the grade of chief warrant officer W–3, with credit for more than 21 years of active Federal service under section 1293 of title 10, United States Code.

During March of 1958, Mr. Fulk applied for transfer, and effective April 1, 1958, was transferred from the Army Reserve to the Army National Guard of the United States in the grade of chief warrant officer W–3. From April 1, 1958, until December 14, 1959, he served a total of 29 days of active duty for training with the Army National Guard of the United States, and on December 14, 1959, Mr. Fulk was discharged. On December 15, 1959, Mr. Fulk was reappointed in the grade of captain, for service with the Army National Guard of the United States, and remained active, performing active duty for training and one period of active duty (October 15, 1961–April 5, 1962), until December 15, 1963, when he was transferred to the Retired Reserve. From March 1, 1958, until December 15, 1963, when not on active duty, and active duty for training, Mr. Fulk received retired pay as chief warrant officer W–3.

On September 24, 1959, the Comptroller General of the United States held that active duty for training and annual training duty performed by a service member after being placed on the retired list may be used in recomputing retired pay under title 10, United States Code, section 1402 (39 Comp. Gen. 217).

On July 11, 1960, referring to the decision of the Comptroller General, Mr. Fulk petitioned the Army Board for the Correction of Military Records for correction of his records to "show that he retired in grade of captain by virtue of having served on active duty in this higher grade subsequent to retirement from active duty in grade CWO W–3". On January 10, 1961, the Army Board for the Correction of Military Records requested the comments of The Adjutant General on Mr. Fulk's request. On January 23, 1961, The Adjutant General advised that Mr. Fulk was not entitled to retire in the grade of captain, because he had not completed 10 years of active Federal service as a commissioned officer (10 U.S.C. 3411, ch. 1041, 70A Stat. 224, August 10, 1956). This advice was not returned directly to the Army Board for the Correction of Military Records, but was forwarded to the Chief of Finance for further processing.

On February 13, 1961, the Department of the Army erroneously recomputed Mr. Fulk's retired pay, effective December 15, 1959. This recomputation was based on the pay of a captain with over 21 years of service, but should have been on the basis of a chief warrant officer W–3 with over 21 years of service. Mr. Fulk was paid the amount due him as the result of this erroneous adjustment.

In 1968, it was discovered that the adjustment was erroneous, and on March 13, 1968, Mr. Fulk's retired pay was reduced to that of a chief warrant officer W–3. He was given credit for all service earned by active duty and active duty for training performed after his retirement.

The committee has carefully considered the foregoing facts and secured additional information concerning the matter. Under the particular circumstances the committee has concluded that this is a proper

subject for legislative relief in view of the fact that Mr. Fulk was advised by Army authorities that he was entitled to retired pay as a captain. The report of the Department of the Army has stated that the Army recomputed Mr. Fulk's retired pay based on the pay of a captain effective December 15, 1959. The Department of the Army has informally advised the committee that he was advised of this recomputation by letter by the Army which, among other things stated affirmatively that he was entitled to pay based on the rank of captain.

Further the committee has concluded that the imposition of this amount of indebtedness upon a retired warrant officer has imposed a hardship upon him which is inequitable in view of the circumstances of that payment. Accordingly, it is recommended that the bill be considered favorably.

Attached hereto and made a part hereof are the reports submitted to the House Judiciary Committee by the Department of the Army and the Comptroller General.

DEPARTMENT OF THE ARMY,
Washington, D.C., September 24, 1969.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of the Army on H.R. 2950, 91st Congress, a bill for the relief of Edwin E. Fulk.

This bill would relieve Mr. Fulk "of liability to the United States in the amount of $4,963.46, representing the total amount of overpayments of retired pay paid to him during the period from December 15, 1959, through March 31, 1968, by the Department of the Army as a result of administrative error."

The Department of the Army is not opposed to the bill.

Department of the Army records reveal that Mr. Fulk was born on January 1, 1916. He enlisted in the Oregon National Guard on April 13, 1935, performed no active duty, and was discharged on September 29, 1936. On October 1, 1936, Mr. Fulk enlisted in the Regular Army and served on continuous active duty, until discharged on February 28, 1958. While in an active status, Mr. Fulk served as a commissioned officer (May 11, 1949–June 13, 1953 and November 10, 1950–December 29, 1953), a warrant officer (February 25, 1943–May 10, 1949), and as an enlisted member. At the time of his final discharge from the Regular Army, Mr. Fulk held an appointment in the grade of chief warrant officer W–3, assigned to the Army Reserve.

On March 1, 1958, Mr. Fulk was retired in the grade of chief warrant officer W–3, with credit for more than 21 years of active Federal service under section 1293 of title 10, United States Code.

During March of 1958, Mr. Fulk applied for transfer, and effective April 1, 1958, was transferred from the Army Reserve to the Army National Guard of the United States in the grade of chief warrant officer W–3. From April 1, 1958, until December 14, 1959, he served a total of 29 days of active duty for training with the Army National Guard of the United States, and on December 14, 1959, Mr. Fulk was discharged. On December 15, 1959, Mr. Fulk was reappointed in the grade of captain, for service with the Army National Guard of the

United States, and remained active, performing active duty for training and one period of active duty (October 15, 1961–April 5, 1962), until December 15, 1963, when he was transferred to the Retired Reserve. From March 1, 1958, until December 15, 1963, when not on active duty, and active duty for training, Mr. Fulk received retired pay as chief warrant officer W–3.

On September 24, 1959, the Comptroller General of the United States held that active duty for training and annual training duty performed by a service member after being placed on the retired list may be used in recomputing retired pay under title 10, United States Code, section 1402 (39 Comp. Gen. 217).

On July 11, 1960, referring to the decision of the Comptroller General, Mr. Fulk petitioned the Army Board for the Correction of Military Records for correction of his records to "show that he retired in grade of captain by virtue of having served on active duty in this higher grade subsequent to retirement from active duty in grade CWO W–3." On January 10, 1961, the Army Board for the Correction of Military Records requested the comments of The Adjutant General on Mr. Fulk's request. On January 23, 1961, The Adjutant General advised that Mr. Fulk was not entitled to retire in the grade of captain, because he had not completed 10 years of active Federal service as a commissioned officer (10 U.S.C. 3411, ch. 1041, 70A Stat. 224, August 10, 1956). This advice was not returned directly to the Army Board for the Correction of Military Records, but was forwarded to the Chief of Finance for further processing.

On February 13, 1961, the Department of the Army erroneously recomputed Mr. Fulk's retired pay, effective December 15, 1959. This recomputation was based on the pay of a captain with over 21 years of service, but should have been on the basis of a chief warrant officer W–3 with over 21 years of service. Mr. Fulk was paid the amount due him as the result of this erroneous adjustment.

In 1968, it was discovered that the adjustment was erroneous, and on March 13, 1968, Mr. Fulk's retired pay was reduced to that of a chief warrant officer W–3. He was given credit for all service earned by active duty and active duty for training performed after his retirement.

Due to this error, Mr. Fulk was overpaid in the amount of $4,963.46. Overpayment to Mr. Fulk was caused solely by Department of the Army administrative error and there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of Captain Fulk or any other person acting in his behalf. Accordingly, the Department of the Army is not opposed to the bill.

The cost of this bill, if enacted, will be $4,963.46.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,

STANLEY R. RESOR,
Secretary of the Army.

(The report of the Comptroller General which questions relief in this instance is as follows:)

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., March 20, 1969.

B-166140.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your letter of February 7, 1969, requesting our views on H.R. 2950, a bill for the relief of Edwin E. Fulk.

The bill would relieve Mr. Fulk of his liability to repay to the United States the sum of $4,963.46 representing overpayments of retired pay paid to him during the period December 15, 1959, through March 31, 1968, as a result of administrative error. Also, the bill would relieve the certifying or disbursing officer of liability to the extent of the overpayments and authorize and direct the Secretary of the Treasury to pay to Mr. Fulk an amount equal to the sum of any amounts received or withheld from him on account of such indebtedness.

A similar bill, H.R. 18475, was introduced in the 90th Congress but apparently no action was taken on that bill.

It appears from the records before us that Master Sergeant Fulk was retired effective February 28, 1958, in the grade of chief warrant officer, W-3, under the provisions of 10 U.S.C. 1293, with 21 years, 6 months, and 21 days active Federal service for retirement and 23 years, 10 months, and 17 days total service for basic pay purposes. The member's statement of service indicates, among other things, that prior to his retirement he served on active duty as a first lieutenant, AUS, from November 10, 1950, to September 30, 1953, and as a captain, AUS, from October 1, 1953, to December 29, 1953. Thus, during his period of service prior to retirement he completed only 3 years, 1 month, and 20 days of active commissioned service. Since he had less than 10 years active commissioned service, he was not eligible to retire as an officer with 20 years service under 10 U.S.C. 3911. Hence, the highest grade to which he was entitled at the time of retirement was CWO-3.

The record further shows that subsequent to his retirement the member performed various periods of active duty training commencing May 14, 1958, as a CWO-3, Army National Guard, and on December 15, 1959, he was promoted to captain in that component. He performed various periods of active duty training as a captain, ARNG, and as major, USAR, including a period of active duty as a commissioned officer from October 15, 1961, to April 5, 1962. He was transferred to the Retired Reserve as a major on December 15, 1963. His commissioned service subsequent to retirement totaled 8 months and 22 days, and his total active service subsequent to retirement amounted to 9 months and 24 days.

Under the provisions of 10 U.S.C. 1402(a), in effect during the period here involved, a member of an armed force who had been retired and who thereafter served on active duty, was entitled, upon release from that duty, to recompute his retired pay (1) by taking the monthly

basic pay of the grade in which he would be "eligible to retire if he were retiring upon that release from active duty," and (2) multiplying that amount by 2½ percent of the sum of (a) the years of service that may be credited to him in computing his retired pay, and (b) his years of active service after retirement. In this connection, it should be noted that Mr. Fulk was not eligible to retire as a captain upon his release from active duty in 1962 since he had insufficient active commissioned service to meet the requirements of section 3911.

In our decision of September 24, 1959, B–139990, 39 Comp. Gen. 217, copy enclosed, we held that "active duty for training" performed after August 10, 1956, was to be regarded as active duty for increasing retired pay under section 1402(a). While that section permitted Mr. Fulk to include his active service after retirement for the purpose of recomputing his retired pay, neither that law nor our decision of September 24, 1959, had the effect of changing the grade held by him at the time of retirement, namely CWO–3.

The record further indicates that based on the erroneous assumption that the member's promotion to captain, ARNG, on December 15, 1958, entitled him to recompute his retired pay on the basis of the grade of captain, he was paid the difference between the retired pay of a CWO–3 and that of a captain for the period December 15, 1959 to January 31, 1961, as shown by an adjustment made in January 18, 1961. Commencing February 1, 1961, his retired pay was computed as a captain and continued on that basis through March 31, 1968, when his retired pay was again recomputed on the basis of CWO–3.

Taking into consideration deductions from retired pay during periods of active duty for training and a period of active duty, Mr. Fulk was overpaid retired pay in the amount of $4,963.46, the amount stated in H.R. 2950. The record further indicates that after deducting $100 a month from the member's retired pay for June and July 1968, collection action was suspended pending action on the relief bill in the 90th Congress.

The record also shows that by letter dated January 17, 1968, the Army Finance Center requested the Adjutant General of the Army to determine the member's eligibility for advancement on the retired list under 10 U.S.C. 3964. This section provides that each warrant officer of the Army and each enlisted member of the Regular Army is entitled, when his active service plus his service on the retired list totals 30 years, to be advanced on the retired list to the highest temporary grade in which he served on active duty satisfactorily as determined by the Secretary of the Army. In concluding that Mr. Fulk was not entitled to be advanced to a higher grade on the AUS retired list under 10 U.S.C. 3964, The Adjutant General in first endorsement dated February 20, 1968, stated, in pertinent part, as follows:

"1. Member was entitled to retired pay in the grade of CW–3 at time of retirement on February 28, 1958. He was not eligible for retired pay as a commissioned officer, since he had completed only 3 years, 1 month, and 20 days of active commissioned service. DD forms 424 dated November 3, 1960 and June 28, 1962, certified information to your office that member had performed additional active Federal service subsequent to retirement, and he was entitled to recomputation of his retired pay in accordance with the Comptroller General's De-

cision B–139990, dated September 24, 1959, as provided under section 1402(a), title 10, U.S.C. These documents did not in any way direct a change in his retired grade, however, the grades in which he performed additional active duty were specified.

"2. On November 9, 1960, Mr. Fulk requested a review of his records by the Army Board for Correction of Military Records to show retirement in the grade of captain, by virtue of having served on active duty in the higher grade subsequent to retirement from active duty in the grade of CW–3. On February 13, 1961, the Office, Chief of Finance, advised the Army Board for Correction of Military Records, copy attached, that Mr. Fulk's retired pay was recomputed using the active duty pay of captain with his years of service for basic pay purposes in the computation. The increase in retired pay was based on the Comptroller General's Decision B–139990."

It appears that the Correction Board did not take favorable action on Mr. Fulk's request and no determination has been made that he served satisfactorily in the grade of captain for purposes of section 3964.

We do not view with favor legislation such as H.R. 2950 which grants preferential treatment to an individual over other persons similarly situated. Other members and former members of the Armed Forces have been required to refund overpayments of pay and allowances, including retired pay, received by them as the result of administrative error. On the record before us we find no special equity in Mr. Fulk's case which would warrant our recommending favorable consideration of the bill.

Sincerely yours,

R. F. KELLER,
Acting Comptroller General of the United States.

Enclosure.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, September 24, 1959.

B–139990.

The Honorable, the SECRETARY OF DEFENSE.

DEAR MR. SECRETARY: Reference is made to letter of June 18, 1959, from the Assistant Secretary of Defense (Comptroller), requesting a decision as to whether active duty, as defined in section 101(22) of title 10, United States Code, for training performed subsequent to retirement or transfer to the Fleet Reserve or the Marine Corps Reserve may be credited for the purpose of increasing retired pay under section 1402(a) of title 10 of the Code. The question is set forth in committee action No. 242 of the Military Pay and Allowance Committee, Department of Defense, as follows:

"Is it the intent of title 10, United States Code, section 101(22) that active duty for training performed subsequent to retirement or transfer to the Fleet Reserve of the Marine Corps Reserve be credited for the purpose of increasing retired pay under section 1402(a) of title 10 of the Code?"

The reference to the Marine Corps Reserve in the question submitted is presumed to mean the Fleet Marine Corps Reserve.

The Naval Reserve Act of 1938 and the Armed Forces Voluntary Recruitment Act of 1945, as amended by the act of August 10, 1946, 60 Stat. 994, authorized, upon completion of 20 years of active service, the transfer of enlisted members of the Navy to the Fleet Reserve and the placement of Army members on the retired list, respectively, with retainer and retired pay computed as there prescribed, that is, on the basis of 2½ percent of base and longevity pay times the number of years of creditable active service.

Until the completion of 30 years total service, active, and inactive, such members were subject to the obligation to perform additional active duty. Under section 7 of the 1946 act, Army members were "subject to perform such periods of active duty as may * * * be prescribed by law" and section 8(a) of that act authorized the recomputation of retired pay upon release from such active duty with credit for such additional active service. Section 206 of the Naval Reserve Act required members of the Fleet Reserve in time of peace "to perform not more than two months' active duty in each four year period." Section 208 of the Naval Reserve Act, as added by the 1946 act, authorized the recomputation of retainer and retired pay of fleet reservists and former fleet reservists based on active service performed after transfer or retirement "except that which they are required to perform in time of peace under section 206."

Section 516 of the Career Compensation Act of 1949, 63 Stat. 832, authorized members of the Fleet Reserve and retired members of the Navy to receive increases in retired pay and retainer pay for all active duty performed after retirement or transfer to the Fleet Reserve, and to that extent superseded the provisions of section 208 of the Naval Reserve Act. See page 1092 of House Report 970, 84th Congress.

However, section 208 was not expressly repealed by the Career Compensation Act. Since a statute is not deemed repealed or amended merely by enactment of another statute on the same subject, and since repeals by implication are not favored, when there are two acts on the same subject both must be given effect if possible. *Rosenberg* v. *United States*, 346 U.S. 273; 34 Comp. Gen. 170, 172; 55 Col. L. Rev. 1039. Accordingly, it must be held that for the purpose of computing retainer and retired pay the provision in section 208 excluding active duty required by section 206 remained in full force and effect after the enactment of the Career Compensation Act of 1949 until that section was expressly repealed by the act of August 10, 1956, 70A Stat. 675. Hence, such active duty performed prior to August 10, 1956, is not creditable for the purpose of increasing retired pay. Section 516 of the Career Compensation Act was superseded effective August 10, 1956, by 10 United States Code 1402(a).

Concurrently with the repeal of section 208 of the Naval Reserve Act the act of August 10, 1956, enacting into positive law title 10, United States Code, provided in 10 United States Code 101(22) that "'Active duty' means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned."

The provisions of the Naval Reserve Act of 1938 respecting transfer of members of the Navy to the Fleet Reserve upon completion of

20 years of active service and retirement upon completion of 30 years of service were codified in 10 United States Code 6330 and 6331 by the act of August 10, 1956, 70A Stat. 396, 397. Section 6330(c) authorizes the recomputation of retainer pay under section 1402 to reflect active service after transfer. Section 1402(a) provides for increases in retainer pay for members of the Fleet Reserve and for increases in retired pay for retired members of the Navy on account of active service performed after transfer to the Fleet Reserve or after retirement. Since the definition of "active duty" contained in 10 United States Code 101(22) includes "full-time training duty" and "annual training duty," and since section 208 of the Naval Reserve Act of 1938 was repealed by the act of August 10, 1956, without reenacting the prohibition there contained, such training duty performed on and after that date must be regarded as "active duty" within the meaning of 10 United States Code 1402(a).

Attention is also invited to decisions 36 Comp. Gen. 179, 37 Comp. Gen. 264, and 38 Comp. Gen. 251 relating to the question of whether active duty for training is "active service" within the meaning of section 203(b) of the Career Compensation Act of 1949, as amended, 37 U.S.C. 234(b), providing additional special pay to certain medical and dental officers in amounts dependent upon the number of years of active service as physicians and dentists. For the reasons there stated we concluded that active duty for training performed prior to August 10, 1956, was not such active service but that active duty for training performed after August 9, 1956, is active service. Also, the crediting of training duty performed prior to August 10, 1956, as active duty in computing the special pay of physicians and dentists would contravene the provisions of section 49(f) of the act of August 10, 1956, which provides that its enactment does not increase the pay of any person.

The committee action discussion refers to section 202(b) of the Career Compensation Act of 1949, to section 3(b) of the act of May 20, 1958, 72 Stat. 128, and to House Report 970 of the Committee on the Judiciary to accompany H.R. 7409 (enacted into Public Law 1028, 84th Congress), as possibly having a bearing on the question of crediting active duty for training after transfer of the Fleet Reserve. Section 202(b) of the Career Compensation Act relates to increases in the longevity pay factor in the computation of retired pay on account of inactive retired service. It does not prohibit increases in retired pay on account of active service after retirement; in fact, it recognizes that active service after retirement increases retired pay. There is nothing in that section which would operate to preclude increases in retired pay on account of active duty for training performed on or after August 10, 1956. Compare 37 Comp. Gen. 264.

Section 3(b) of the 1958 act relates to the problem of whether a member receiving retainer or retired pay who performs active duty after transfer or retirement should receive retainer or retired pay at the pay rates in effect on May 31, 1958, or those provided in the 1958 act. As to the effect of that provision on such active service on the computation of retired pay, see decision of June 19, 1959, B–138825, 38 Comp. Gen.—. Nothing in that provision of law in any way operates to prevent the crediting of active duty for training in the recomputation of retired pay.

In House Report 970, 84th Congress, to accompany the bill which became Public Law 1028, it was stated that the definition of "active duty" was based on the definition of "active Federal service" in the source statute, since it was believed to be closer to the general usage than the definition in 50 U.S.C. 901(b), which excludes active duty for training from the general concept of active duty. The report also indicates that the source for the definition in 10 United States Code 101(22) is 10 United States Code 1036e(d) and 34 United States Code 440m(d), that is, section 306(d) of title III of the act of June 29, 1948, relating to retirement of members of the Reserves for active and inactive military service, 10 United States Code 1331. The fact that the definition of "active duty" in 10 United States Code 101(22) may be based on title III of the 1948 act does not in any way restrict the scope of the definition adopted in the 1956 act so as to prevent considering active duty for training as active duty within the meaning of 10 United States Code 1402(a).

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.